92-195

Docket No.

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October, 1992 Term

JOHN MURPHY, Plaintiff, Respondent

-against-

ARLINGTON RAY ROBBINS, Petitioner

-and-

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arlington Ray Robbins
ROBBINS & KEEHN
530 B Street, Ste 1700
San Diego, CA 92101
(619) 232-1700

In Pro Se

QUESTION PRESENTED

In an action brought against local government under the Establishment Clause of the First Amendment of the United States Constitution, does a person have the constitutional right to intervene under the Establishment Clause when it is contended that the remedy being sought by Plaintiff in the action is not required under the Constitution and would in fact be hostile to religious preference of the person seeking to intervene and would cause such person both economic and non-economic injury equal or greater to that claimed by Plaintiff?

TABLE OF CONTENTS

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Intervention Proceedings . . . 3

B. Statement of Facts -- Helix Cross Case 8

C. Different Perspective Of Petitioner 15

D. Companion Cases/Appeal Status 21

E. Standing to Raise Related Constitutional Issue 25

REASONS FOR GRANTING PETITION 30

1. Focus of The Issue 30

2. Respondent Seeks to Force Government to Proceed in a Manner Hostile to Petitioner's Religion in Violation of Petitioner's own Rights Under The Establishment Clause 34

3. The Summary Judgment Decision of the District Court, Improperly Interpreting The California Constitution, Violates The Constitutional Rights of Petitioner Under The Establishment Clause Of

The U.S. Constitution, Providing Further Grounds For Intervention 40

4. Petitioner Can Demonstrate Both Economic And Noneconomic Injury Greater Than Claimed By Respondent Under Article III of The Constitution 44

5. Local Citizens Should Not Be Denied The Opportunity To Be Heard Under The Establishment Clause When Their Religious Heritage Comes Under Wrongful Attack By the ACLU 54

6. The Ninth Circuit Has Demonstrated A Wide Ranging Disparity And Inconsistency In Intervention Cases 57

7. Petitioner's Intervention Was Not Made Moot By The County Conveying The Cross, With A Small Part Of The Park Under The Cross, To The Historical Society 60

CONCLUSION 62

APPENDIX A 1a

APPENDIX B 15a

APPENDIX C 17a

APPENDIX D 21a

APPENDIX E 23a

APPENDIX F 25a

APPENDIX G 26a

APPENDIX H 28a

APPENDIX I 29a

APPENDIX J 30a

TABLE OF AUTHORITIES

CASELAW:

ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986), cert. den., 479 U.S. 961 (1986) 45, 54

ACLU v. Eckels, 589 F.Supp. 222 (S.D. Texas 1984) 54

ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) 45-47, 52, 54

ACLU v. Miss. State. General Services Admin., 652 F.Supp. 380 (S.D. Miss. 1987) 54

County of Allegheny v. ACLU, 492 U.S. 573, 106 L.Ed 2d 472, 109 S.Ct. 3086, (1989) 54

Ellis v. City of La Mesa, Civ. No. 90-0135 GT 22

Eugene Sand & Gravel, Inc. v. City of Eugene, 558 F.2d 338 (1976), cert. den., 434 U.S. 876 (1977) 54

Flast v. Cohen, 392 U.S. 83 (1942) 45

Hewitt v. Joyner, 705 F.Supp 1443 (C.D. Cal. 1989), rev., 940 F.2d 1561 (9th Cir. 1991)] . 27-28, 41, 54

Lemon v. Kurtzman, 403 U.S. 602 (1971), reh'g den., 404 U.S. 876 (1971) 37

Lynch v. Donnelly, 465 U.S. 688 (1983) 29, 35-36

McGowan v. Maryland, 366 U.S. 420 (1961) 42

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) 54

Paulson et al. v. City of San Diego, Civ. No. 89-0820 GT 22

Portland Audubon Society v. Hodel, 866 F.2d 302 (1989) . . . 58

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (1983) . . . 56-57

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 57

United States v. SCRAP, 412 U.S. 669 (1973) 46

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464 (1982) 45

STATUTES AND REGULATIONS:

28 United States Code Section 1254(1) 3

Federal Rules of Appellate Procedure 29 23

Federal Rules of Civil Procedure 24 . . . . . 3, 5-6

OPINIONS BELOW

The Memorandum Decision and Order of the United States District Court, Southern District of California, is unreported and is printed in Appendix A hereto, infra, page 1a. The Order of the district court denying petitioner's request for reconsideration is unreported and is printed in Appendix B hereto, infra, page 15a.

The Memorandum decision of the Ninth Circuit Court of Appeals is unreported and is printed in Appendix C hereto, infra, page 17a. The Order of the Ninth Circuit denying petitioner's petition for rehearing is unreported and is printed in Appendix D hereto, infra, page 21a.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals (App. C, infra, page 17a) was entered on December 20, 1991. A timely petition for rehearing was denied

on April 29, 1992 (App. D, infra, page 21a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Federal Rule of Civil Procedure 24 is set forth in Appendix G hereto, infra, page 26a.
2. The First Amendment to the United States Constitution is set forth in Appendix H hereto, infra, page 28a.
3. Article III, Section 2, Clause 1 of the United States Constitution is set forth in Appendix I hereto, infra, page 29a.
4. Article I, Section 4 of the California Constitution is set forth in Appendix J hereto, infra, page 30a.

STATEMENT OF THE CASE

A. Intervention Proceedings.

On January 30, 1990, Respondent John Murphy, represented by the American Civil Liberties Union, (hereafter "ACLU"), filed an action in the United States District Court, Southern District of California, under the United States and California Constitutions to compel the San Diego County Board of Supervisors of the County of San Diego (hereafter "County") to remove a Latin Cross from a county-owned and maintained park located on the top of Mt. Helix, near the City of La Mesa in San Diego County, California (hereafter "Helix Cross Case"). (CR-1, P.8, L.2-6)[1/]. At the time Respondent filed he action he was

---

1/ "CR" denotes the complete original record on appeal in the Court of Appeals; the reference is to Item 1, page 8, at lines 2 through 6.

the President of the local chapter of the ACLU. (CR-33, P.2, L.15-24).[2/]

Appellant brought a motion to intervene as a private citizen in the action on several grounds under both FRCP 24(a)[3/] as a matter of right, and under FRCP 24(b) under the court's discretionary powers. (CR-13). Petitioner contended in his intervention, as was undisputed, that the cross had originally been created as an integral part of an improved private park in 1925 and gifted four (4) years later to the County along with a large perpetual endowment to maintain the cross and park.

Petitioner further contended that the remedy sought by plaintiff and the ACLU in

---

2/ See attached excerpts of deposition transcript of Respondent/Plaintiff John Murphy taken August 28, 1990, P.16, L.15-17 ("Murphy Deposition").

3/ Federal Rules of Civil Procedure ("FRCP"); Federal Rules of Appellate Procedure ("FRAP").

the action -- the destruction and removal of the cross -- was not required under either the United States or California Constitutions, and that destruction of the cross to accommodate the strict separationist views of plaintiff and the ACLU, would: (a) risk loss of the park (by reversion) under the provisions of the original gift deed; and, (b) constitute an unnecessary act hostile to the religious preferences of Petitioner and thousands of other Christians in the immediate area.

The district court denied Petitioner's intervention under both FRCP 24(a) and FRCP 24(b), but permitted Petitioner to participate as amicus curiae in the proceedings below. (App. A, infra, 1a and 15a). Petitioner filed a Request for Reconsideration (CR-25), narrowing the grounds on which Petitioner sought to intervene to the constitutional issues, and refocused the Court on Petitioner's

contention that he had a constitutional right to intervene under the Establishment Clause of the First Amendment of the United States Constitution. (App. H infra, 28a, hereafter "Establishment Clause"). The Request for Reconsideration was also denied by reference back to the memorandum of decision denying the original motion. (App. B, infra, 15a).

The district court's opinion on the First Amendment Issue missed the mark[4/] in addressing Petitioner's fundamental contention. Petitioner contended that removal of the cross by the County to meet the strict separationist standard of

---

4/ The District Court had simply stated in its decision (App. A, infra, 9a) that the Establishment Clause was not a basis for intervention to compel the County to retain the cross, which was not the thrust of Petitioner's contention.

Plaintiff would constitute an unnecessary act under the reasonable accommodation standard of the Establishment Clause -- that such removal would therefore be hostile to the religious preference of Petitioner violating his rights under the Establishment Clause, as well as the rights of thousands of other Christians in the immediate area.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit (hereafter "Ninth Circuit) from the order denying his Request for Reconsideration, again raising the constitutional issues. The Ninth Circuit affirmed the district court's decision in an unpublished memorandum decision filed December 20, 1991 (App. C, infra, 17a). Petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc focusing on the constitutional issues addressed here, which was denied April 29,

1992, without further comment (App. D, infra, 21a). The Ninth Circuit did not address the constitutional issue at all in its memorandum decision despite the fact it had been the main focus of the appeal.

B. Statement of Facts -- Helix Cross Case.

In order for the Court to be able to properly consider the grounds on which Petitioner sought to intervene, an understanding is required of the historical facts very unique to the Helix Cross Case.

The large concrete memorial cross located in a small remote county park atop Mt. Helix was originally erected as part of a private memorial park created in 1925 by the Yawkey family on their own private land atop Mt. Helix in memory of their mother Mary Carpenter Yawkey. (CR-33, P.5, L.9-26 and CR-39, P.3, L.15-27). At the same time a bronze

plaque was erected in the park denoting the primary memorial purpose for which the park was established and the cross erected. (CR-33, P.5, L.18-26 and CR-34, P.2, L.7-14 and photo). A large open air amphitheater was also then constructed as part of the park in which Easter Sunrise services have been held annually, which have been under the auspices of the La Mesa Rotary Club for the past several years. (CR-33, P.14). This followed an annual tradition that goes historically back to 1917 (CR-33, Attachment G, P.3).

In 1929, approximately four years after the memorial was created, the private memorial park was gifted in trust by the son of the deceased mother to the County for public use. (CR-33, P.2, L.1-26 and deed). A $30,000.00 memorial endowment trust fund (in 1929 dollars) was additionally established by the Yawkey family with the income therefrom

to be used solely to maintain this memorial dedicated to Mary Carpenter Yawkey, the grantor's mother. (CR-33, P.8, L.3-14 and deed).

The deed requires the County, as a condition of the gift, to have this dedicated memorial cross lighted on certain family birthdays, Mothers Day, on certain religious holidays, and on such other evenings as the County shall decide. (CR-33, P.7, L.16, P.8, L.3 and deed). The cross has been lighted almost every night for many years, and it has become a well-known historical landmark, used even as a prominent lighted navigational aid for aircraft flying in the area. (CR-33, P.13, L.4).

It is not generally known that the small remote park is County owned; and respondent, a practicing attorney himself, acknowledged in his deposition that although he had earlier lived in the

area for five years, he had not been aware that the park was County owned. (CR-33, P.3, L.16-19 and Murphy Deposition attached). No public funds are used to maintain or light the memorial cross, (CR-33, P.10, L.18 to P.19, L.9), though public funds are now used to supplement the maintenance of the greater park area, since the earnings from the original memorial endowment invested in municiple bonds are no longer sufficient for that larger purpose. (CR-33, P.9, L.9-23).[5/]

Respondent, at the time he filed his complaint, was the President of the local chapter of the ACLU, is a

---

5/ Factual inference -- Note that $30,000 in 1929 dollars adjusted by cost of living to 1991 dollars would be equivalent to nearly $400,000 today and was therefore a very significant endowment.

practicing lawyer, a past president and other officer of the local ACLU chapter in prior years, has been a member thereof for approximately fifteen years (CR-33, P.2, L.15-24 and Murphy Deposition attached at P.16, L.2-17), and is represented by the ACLU. (CR-1). He claims he was raised in the Roman Catholic faith (CR-33, P.2, L.25 to P.3, L.2) and became offended by the cross being displayed on public land when the public nature of its ownership finally became known to him. (CR-33, P.3, L.3 to P.4, L.14). It was Petitioner's contention below, that while Respondent purports to proceed as a private citizen, his long and close association with the ACLU, coupled with his representation by the ACLU, raises the overwhelming inference that he is acting as a surrogate for the ACLU. Petitioner believes the ACLU to be the real party in

interest -- advocating its own national agenda of strict separation of church and State through its local chapter president. (CR-46, P.2; CR-39, P.9, L.4-21).

By contrast, Petitioner and his family have lived in the Mt. Helix area (within less than 1/2 mile from the top of Mt. Helix) since June 1966 -- now over 26 years. (CR-15, P.1, L.22-27; CR-14, P.3, L.10-16). He and his wife have raised their family there, and the memorial cross has consistently played an important role in their daily religious practices and quality of life. (CR-15, P.2, L.1-16 and P.4, L.6-14). Petitioner contended in the court below that while proceeding individually, he and his family are typical of thousands of other Christians who utilize the park and reside there in the several communities immediately surrounding Mt. Helix with a

clear view of the memorial cross. Many of these people, like Petitioner, have chosen to make their homes there because of the peaceful ambience it is believed the prominent memorial cross has provided for the area. (CR-15, P.4, L.15.22; CR-14, P.3, L.16-27 and P.4, L.24 to P.5, L.3).

Petitioner, as an experienced trial and appellate attorney (CR-14, L.12, L.13-22), proceeded in Pro Se (pro bono publico) and informed the court below that he believed he was one of the few people in the area that understands the constitutional issues and court procedures involved, and the real significance of the ACLU action. (CR-14 and CR-15, generally). Appellant sought to intervene as a Christian to provide a concerned private citizen perspective in defense of the action by one who would be

aggrieved were the ACLU successful. (CR-14 and CR-15, generally).

C. Different Perspective Of Petitioner.

Petitioner informed the court that Petitioner could and would provide a much different perspective to the court than would or could be provided by defendants sued in their combined role as the legislative and executive body of the county government, who have both political and constitutional concerns not imposed on Petitioner. (CR-14, P.10, L.11 to P.12, L.22). This proved to be true when summary judgment motions filed by both sides were argued before the district court, after Petitioner's motion to intervene was denied, but the court sua sponte granted Petitioner the opportunity to proceed as amicus curiae, (App. A, infra, 13a).

As demonstrated in the district court, the strategy of defense and the evidence submitted by Petitioner as amicus curiae was quite different than provided by County, as Petitioner came from a very different perspective. The difference in perspective centered on Petitioner acknowledging and taking "head on" the assertion by Respondent that the memorial cross was in fact a Christian cross and a sectarian symbol. (CR-39; CR-46). The County initially hedged, arguing that it was essentially secular in both function and purpose. (See e.g., CR-41, P.4-5, Respondent's Opposition). In this respect, Petitioner placed comparison pictures in evidence of several large Christian cross memorial markers located in Fort Rosecrans National Cemetery, of the same general

vintage as the Helix Cross[6/] to demonstrate the point that such sectarian memorial markers dedicated to individual persons have long been accepted on public property. (CR-46, P.2, Argument III).

Petitioner also urged that the constitutional defense of the cross should be anchored on its private memorial creation and purpose and the conditional gift made to the County requiring it to preserve its memorial creation and purpose. The County relied more heavily on its significance as an historical monument, a navigational beacon and a surveyor's benchmark.[7/]

6/ CR-46, Declaration of Arlington Ray Robbins filed November 6, 1990, in connection with Petitioner's Reply Brief as amicus curiae in the district court.

7/ CR-33 generally and attachments thereto, and specifically Exhibits "F" and "G" thereto as to the designation of the Mt. Helix Nature Park as an historic monument initiated by planning commission action April 19, 1989.

Further, the County has played down the reversionary provisions of the deed, now contending (wrongly Petitioner submits) that they are no longer enforceable because of California statutory law changes[8/]. Petitioner believes these would be held unconstitutional if applied to the particular gift deed because of improper notice procedures.

The most glaring example of this difference in perspective and resulting strategy was the County's conscious decision to not bring to the court's attention below that it had relocated the first Jewish Synagogue established in San Diego County, from its original cite in the City to the County's heavily visited Historical Park located in "Old Town" in

---

8/ Appellant's Supplemental Brief filed on or about July 7, 1992, at P.8, L.26 to P.9, L4 in Docket No. 92-55903.

the City of San Diego. (CR-49, P.2, L.7-13, and CR-39, generally). This historical Synagogue proudly displays seven large "Star of David" windows in the most visible and prominent location as the very focal point of this heavily visited tourist park. (CR-49, P.2, L.2-6 and attached photographs; CR-48).

Petitioner, in his role as amicus curiae, brought this fact to the court's attention when he was informed that the County had consciously decided not to do so for political reasons. (CR-49, P.2, L.7-13 generally). Petitioner did so to argue that one of the things the court should consider is the demonstrated religious neutrality of the County in displaying these differing religious monuments for their historical and cultural significance to the area; (CR-46, P.6, L.6-11); and, that considered collectively these differing

monuments would not communicate to any reasonable observer any intent on the part of the County to endorse any particular religion.

In its appeal in the Helix Cross Case (Docket No. 92-55093), the County has now made this one of its major arguments in its briefs -- relying heavily on the very evidence Petitioner demonstrate this point.[9/]

Petitioner further proposed to the district court specific signage to be installed in the park to inform all visitors of the history, purpose and donated origin of the cross and park welcoming all to visit and enjoy its peaceful ambience and magnificant views. (CR-39, P.12, L16-23). Such was based on

---

9/ Appellant's Brief of County at P.16, L19-23; Appellant's Reply Brief filed at P.15, L1 thru P.16, L2. (Docket No. 92-55093).

the premise that no one would even know that it was a public park, or even that a park existed there, seeing the cross from below and/or afar. Only when one actually drove up and visited the park might one recognize it was a public and not a private park -- and then the proposed signage would apprise a reasonable person of how and why it come to be as a private memorial and gift to the public. This signage approach was then adopted and supported by the County in its briefing of the summary judgment motions before the district court. (CR-45, P.6, L3-13).

D. Companion Cases/Appeal Status.

The Helix Cross Case was filed in close conjunction with two other actions filed in the same district court, one attacking a large latin cross on top of Mt. Soledad in the City of San Diego, State of California (Paulson et al. v.

City of San Diego, Civ. No. 89-0820 GT) and the other attacking the City Seal of the City of La Mesa of California (a suburb of San Diego), which contains a small symbol of the Mt. Helix Cross (Ellis v. City of La Mesa, Civ. No. 90-0135 GT). The facts in these other two cases are materially different than the very unique history and purpose of the memorial cross on Mt. Helix. Petitioner did not seek to intervene in either of these cases which have little direct effect on him.

All three cases were coordinated by the district court with motions for summary judgment set to be briefed and heard on the same dates and decided together in one written decision entered December 10, 1991. (CR-63)[10/]. The district court granted judgment in favor

---

10/ The basis of the decision is discussed at point E, infra.

of the plaintiffs in all three actions enjoining the continued existence of the two latin crosses on public land and the symbol of the cross in the City of La Mesa's Seal.

All three cases are presently on appeal to the Ninth Circuit to be heard de novo. (Docket Nos. 92-55093; 92-55087; and 92-55086). Oral argument has been held and they stand submitted but as yet undecided by the Ninth Circuit. Petitioner filed an appeal in the Helix Cross Case (Docket No. 92-55146) to preserve all rights of appeal pending a final determination of intervention. Petitioner's appeal was dismissed on the basis that Petitioner was not a proper party. (App. E, infra, 23a). Petitioner filed a 48-page, 14 issue amicus curiae brief on appeal in the Helix Cross Case on March 3, 1992 under FRAP 29. The Court later denied, however, Petitioner's

Request to Participate in Oral Argument as amicus curiae. (App. F, infra, 25a).

Stays were requested to be entered by the Ninth Circuit in all three cases. The County, at a later date (by letter of February 27, 1992) withdrew its request on the basis of having transferred a small patch of ground in the park with a 15 foot radius around the Helix Cross, to the San Diego Historical Society -- contending that the County had fully complied with the district court's order enjoining its continuation on public land.

Both the County, and Petitioner as amicus curiae, argued in the appeal (Docket No. 92-55093) that the issue is not made moot by the transfer on several grounds, one of which is based on the public pronouncements by the ACLU that such action is a deliberate circumvention of the district court's order which the

ACLU intends to pursue in the courts.[11] The ACLU in that appeal has not argued that the case is moot. Based on these pronouncements, Petitioner believes the ACLU hopes to get the decision affirmed in the Ninth Circuit in all three cases, after which it will attack the County's transfer as a wrongful circumvention of the district court's injunction.

E. Standing to Raise Related Constitutional Issue.

Petitioner asserts an additional constitutional ground for intervention in the Helix Cross Case, which arises out of the decision of the district court. An

---

11/ See Point 7 under Reasons For Granting The Petition infra; See also Brief of Arlington Ray Robbins as amicus curiae in Docket No. 92-55093, at P.47, Part H. of Argument and Exhibit D, Column 3. Petitioner also represented to the Ninth Circuit in his amicus brief that the local chapter's national representative, Professor Irons, had made several statements in television interviews that the ACLU would attack any such transfers as a circumvention of the ruling.

understanding of the procedural circumstances of how, and on what basis, that case was decided by the district court is necessary to put the issue in focus.

The primary thrust of the moving and reply papers in the summary judgment motions filed in all three cases in the district court was the Establishment Clause of the United States Constitution. The equivalent provisions of the California Constitution were also raised but essentially treated by all parties as being subject to parallel construction with the United States Constitution Establishment Clause. The "no preference" clause of the California Constitution (App. J, infra, 30a), on which the district court ultimately decided the case, had been cited but had not been separately argued at all in the motions made by the parties.

During the nearly 13 months that the district court had the cases under submission it gave notice to the parties (CR-55), that it would await the decision of the Ninth Circuit in Hewitt v. Joyner, 705 F.Supp 1443 (C.D. Cal. 1989) then on appeal [later reversed in 940, F.2d 1561 (9th Cir., 1991)]. The Hewitt decision reversed the lower court's decision in that case, (which had been decided under the federal Establishment Clause), by applying the "no preference" clause of the California Constitution, expanding it beyond existing California case law.

The request of the County to further brief the then submitted motions, based on the totally different grounds decided by the Ninth Circuit in the Hewitt decision, was not granted[12/].

12/ No response was provided by the district court to letter requests to entertain additional briefing (See Petitioner's amicus brief in Docket No. 92-55093, P.13-15).

The district court subsequently decided all three cases before it without any briefing or argument at all from the parties on the issue of the application of the California "no preference" clause under the recently decided Hewitt decision. Petitioner believes that the controlling facts in Hewitt are non-existent in the Helix Cross Case, and that the court grossly and wrongly expanded on the Hewitt decision in deciding the Helix Cross Case.

The district court's decision in the three cases was filed just before oral argument and submission of Petitioner's intervention appeal in the Ninth Circuit. In the Petition for Reconsideration before the Ninth Circuit (filed 1/17/92), Petitioner raised as an additional constitutional issue (P.13, Part H) the application to the Helix cross of the "no preference" clause -- as

interpreted by the district court as prohibiting even the "appearance" of any religious preference -- as an infringement of Petitioner's rights under the Establishment Clause of the First Amendment of the United States Constitution. Petitioner argued that the Establishment Clause of the United States Constitution, as the supreme law of the land, requires the government to accommodate all religions and to show hostility toward none under Lynch v. Donnally, 465 U.S. 688 (1983) discussed infra.

REASONS FOR GRANTING THE PETITION

1. Focus Of The Issue.

This case presents an important First Amendment constitutional issue that concerns the right of affected local citizens to have access to the courts to oppose well organized and funded legal attacks brought under the Establishment Clause seeking to force local government to abandon its accommodation of long standing religious heritage. It puts in focus the question as to whether or not local government -- hamstrung by broad based representation, political considerations and constitutional restraints -- can effectively represent the interests of those who may be most directly and adversely affected by the judicial remedy being sought.

The focus of the constitutional issue in which this question arises involves that point at which a

governmental retreat from "accommodation" under the Establishment Clause becomes in fact "hostile" to the religious preference of the citizens most adversely affected by the action. The Ninth circuit not only sanctioned the decision of the district court, which had failed to properly address the constitutional issue clearly raised in that court by Petitioner, but failed itself to address the issue presented on appeal.

Petitioner's research has not located any decision of any court regarding the constitutional question raised in this Petition. Petitioner

believes it is a case of first impression under the Establishment Clause.[13/]

The factual context in which the question arises is unique in that the memorial cross at issue is located within a privately created memorial park, previously owned privately for several years, and later gifted in trust to the County and is maintained by a private endowment. The gift deed was made on condition that the original memorial purpose of the park and memorial cross be preserved subject to reversionary

---

13/ Petitioner has reviewed numerous intervention cases, some of which raised constitutional questions, but none of them dealt with the Establishment Clause question raised here and are of little analogous help. None were cited on appeal by the ACLU that supported Respondents opposition. The Ninth Circuit did not address the issue, and the cases cited by the district court (App. A, infra, 9a) are not on point.

provisions in the gift deed. The unique facts in this case put into extremely sharp focus the differing philosophy of the accommodation and strict separation view points under the Established Clause.

The underlying question under the facts in this case is not the right of such citizens to intervene to compel local government to continue to maintain the memorial cross as Petitioner's arguments were characterized by Respondent and by the district court below, but the right to oppose its unnecessary destruction to appease a strict separationist ideology believed to be wrong under the accommodation requirement of the First Amendment. The fundamental right is the right of potentially aggrieved parties to be heard and to not have to depend upon the

hobbled defensive litigation strategies of local government.

Local government dances to a different drummer, as it must answer to a multitude of perspectives, and may have less incentive to oppose such an attack, and as a consequence proceeds essentially with one hand tied behind its back. Certainly, one cannot state that local government -- which must provide broad based representation -- would provide the same perspective as those of the religious faith who would be most adversely affected. This fact has already been clearly demonstrated as shown under Point C of the Statement of the Case, supra.

2. Respondent Seeks to Force Government to Proceed in a Manner Hostile to Petitioner's Religion in Violation of Petitioner's own Rights under the Establishment Clause.

Petitioner does not urge that the Christian cross be shown any preference

on public property. His contention below was that the forced destruction of the memorial cross, as sought by the ACLU and Respondent, would defeat the secular purpose for which the memorial cross was constructed -- to be a private memorial marker to a specific person -- and would violate the conditions of the gift deed entrusting the memorial park to the County for the beneficial enjoyment of all. He argued that the ACLU and Respondent seek to impose a strict "separationist" test when it comes to Christian crosses, in contrast with the long established "accommodation" test the Supreme Court has stated is mandated by the Constitution for all religions [Lynch v. Donnelly, 465 U.S. 688 (1983)] -- that they seek to have the courts proceed as if a cross on public land is wrong per se. Understandably, no court has ever asserted this view.

It has been Petitioner's contention, since he first sought to intervene that, given the unique facts of this case, the destruction of this particular memorial cross is not required under the Establishment Clause as interpreted by this Court and would be totally unjustified under the First Amendment. Such destruction to appease one small but very vocal "separationist" element in our society would constitute a sacrilegious act against the constitutional rights of Petitioner and other Christians under the Establishment Clause, which ensures to all persons that government shall accommodate all religions, with hostility toward none.[14/]

This Court, in upholding the City of Pawtucket's display of a Christian crèche in Lynch, enunciated the view that

---

14/ Lynch v. Donnelly, supra at p. 673.

the Establishment Clause mandates accommodation of all religions and prohibits hostility toward any. The Court stated:

> "It has never been thought either possible or desirable to enforce a regime of total separation....' (citations omitted). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." (Emphasis added, 465 U.S. 673).

The second prong of the Lemon[15/] test was framed in the alternative to determine whether the primary effect of government conduct either advances or inhibits religion. Petitioner submits that the court ordered destruction of a Christian cross -- legitimately established for the secular purpose of being a private memorial marker to a specific person on private property later donated to the public -- would have the

---

15/ Lemon v. Kurtzman, 403 U.S. 602 (1971).

primary effect of inhibiting the Christian religion.

Clearly the destruction and removal of dedicated memorial markers existing in the Fort Rosecrans National Cemetary (footnote 6 and related text on pages 16-17, supra.), because they are Christian crosses located on public land, would be hostile and in violation of the accommodation requirement of the Establishment Clause. Petitioner contends that the same should be true as to the dedicated memorial marker to Mary Carpenter Yawkey originally erected on private property. In this context, viewing the demolition of this large solid concrete memorial marker (in the shape of the very symbol of Christianty) by wrecking balls and jack hammers would be perceived by millions of Christians nationally as a sacrilegious act. The obvious inequity of denying the

intervention of a Christian perspective with full rights of advocacy as a party to the very judicial proceedings interpreting the Establishment Clause that may lead to any such action, cannot be denied.

The district court construed Petitioner's constitutional right to intervene as being for the purpose of compelling the County to continue the existence of the cross on public land, stating there is no such constitutional right. (App. A, infra., 9a). Respondent of course argued the same point in Petitioner's appeal to the Ninth Circuit. This stands Petitioner's argument on its head. As set forth above, Petitioner seeks to intervene to set forth a Christian perspective in defending against the removal of this particular memorial cross urging the accommodation viewpoint of the

Establishment Clause which Petitioner believes this Court has historically favored over the strict separationist viewpoint urged by the ACLU and Respondent.

3. The Summary Judgment Decision of the District Court, Improperly Interpreting The California Constitution, Violates The Constitutional Rights of Petitioner Under The Establishment Clause Of The U.S. Constitution, Providing Further Grounds For Intervention.

Petitioner also asserts as an additional grounds for intervention that the summary judgment decision of the district court, interpreting the "no preference" clause of the California Constitution, violates Petitioner's constitutional rights under the Establishment Clause of the United States Constitution.

The decision of the district court which was rendered just before Petitioner's appeal was submitted in the Ninth Circuit, gave rise to this

additional constitutional question raised by Petitioner in his Petition for Reconsideration, and in this Petition for Certiorari, as further demonstration of Petitioner's right to intervene (see point E, Statement of Case, supra). This issue was not anticipated by any of the parties in the original action until after the court's decision applying and expanding on the holding of Hewitt, supra.

Because of the district court's refusal to permit any briefing of the effect of the Ninth Circuit's reversal in Hewitt to the facts in this case, no opportunity was provided to make this constitutional argument in the district court, or by Petitioner in his intervention appeal before it was submitted for decision.

Even if it wanted to, the County has no standing to challenge, on behalf

of Petitioner or other persons, California constitutional provisions as being in violation of the Bill of Rights under the U.S. Constitution. Only the injured person can demonstrate the necessary "standing" to raise the Establishment Clause[16/]. Provided this Court issues its writ and ultimately holds that Petitioner should be permitted to intervene as a party defendant, only Petitioner would be procedurally in the position with proper standing, motivation and nexus in this case to assert this constitutional challenge, now ripe for appellate consideration.

Petitioner is now in a quandry, as he has no recognized standing to raise

---

16/ The County does not, for example, have standing to assert infringement of an individual's religious freedom pursuant to the Establishment Clause. McGowan v. Maryland, 366 U.S. 420, 429 (1961).

this additional constitutional issue as a party in the Helix Cross Case now on appeal (though he asserted it in his amicus curiae brief filed March 3, 1992 in Docket No. 92-55093 at P.46, Argument, Part H.). A remand to the district court for further proceedings would make this issue germane to be raised below by Petitioner, if he were made a party in those proceedings. On the other hand, affirmation of the district court's decision leaves Petitioner without standing to petition this court on the issue unless he were made a party.

This Court is very unlikely to consider a petition to interpret California Constitutional law, which is the primary domaine of the California courts. This Court may, however, be concerned with the question of whether the State Constitution -- as being interpreted by the federal courts below

in an expanded strict separationist manner -- would violate the "accommodation" requirement of the Establishment Clause of the United States Constitution as to Petitioner and thousands of other Christians, not only in the Mt. Helix area, but the entire State of California.

Petitioner, as a person intended to be protected under the Bill of Rights, has "standing" to raise the issue under Article III and the First Amendment of the United States Constitution, but only as a "proper party" could he file a Petition For Writ Of Certiorari on the question in the Helix Cross Case.

4. Petitioner Can Demonstrate Both Economic And Noneconomic Injury Greater Than Claimed By Respondent Under Article III Of The Constitution.

Petitioner easily meets and exceeds all of the criteria for "standing" normally imposed on plaintiffs by the

courts under Article III of the Constitution[17/] in Establishment Clause cases. Standing under Article III of the United States Constitution, sufficient to initiate an action in the federal courts, can be established on grounds of either economic or non-economic injury. The most common basis for economic injury is a taxpayer's challenge of the improper use of taxpayer funds [Flast v. Cohen, 392 U.S. 83, 88 (1942)]. Recognized examples of non-economic injury in Establishment Clause cases would be reluctance or refusal to use a public park because of the existence of a religious symbol found offensive [e.g. American Civil Liberties Union of Ga. v. Rabun County Chamber of Commerce, 698

17/ Hereafter all references are to the United States Constitution unless expressly stated otherwise.

F.2d. 1098 (1983)], or going out of one's way in a route of travel to avoid having to observe such a symbol American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265 (1986).

The issue of Title III standing in Establishment Clause Cases often has been considered to be in a special category [see discussion in Rabun, 698 F.2d. 1098 at 1102-3]. This Court, however, has held that neither a mere spiritual stake in the outcome, nor an intense commitment to a principle, nor psychological consequences presumable produced by observation of conduct with which one disagrees, confers standing [Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)]. This Court has also made it clear, however, that no minimum quantitative limit is required to establish injury under the constitution.

As stated in United States v. SCRAP, 412 U.S. 669 at 689 n.14:

> "'Injury in fact'... serves to distinguish a person with a direct stake in the outcome of the litigation -- even though small -- from a person with a mere interest in the problem."

In Rabun, which cited this principle, it was found as noted at P.1107 that all of the plaintiffs resided in Atlanta, Georgia, more than one hundred (100) miles away. None of them had ever visited the state park that contained a latin cross erected by the Chamber of Commerce; and only one had even seen the cross before the suit was filed -- and then only once from an airplane. Other plaintiffs learned of the cross from anonymous telephone calls and news releases [Rabun at P.1107]. The court in Rabun found that proper standing existed merely from the fact that the plaintiffs in that case may choose some

day to travel over one hundred (100) miles to make use of a state park that none had ever seen or used before. Petitioner does not argue here with the holding of that case on the standing question, but refers to it to demonstrate how diminimus the "potential" of injury need be to successfully assert proper standing to initiate an action under the Establishment Clause.

Petitioner contends that he easily meets the Title III standing test based on both economic and uneconomic injury greater than the Plaintiffs in Rabun. In fact Petitioner contends that he can show substantially greater economic and non-economic injury resulting from Respondent achieving destruction of the cross in this case than Respondent is required to show in establishing his "standing" to bring the action. He bases this contention on the following:

First, Petitioner, as a local taxpayer, has supported the local park with his county taxes for over twenty-five (25) years. He has a vested interest in the park which he frequently uses and enjoys as his closest neighborhood park. Removal of the memorial cross would violate the conditions of the gift deed by which the memorial park was conveyed in trust triggering the reversionary clauses of the deed. As noted by the district court in its summary judgment decision in the Helix Cross Case entered December 10, 1991 at pages 29-30 (CR-63):

> "The court entertains no doubt that the County's conduct in permitting the cross to stand atop Mt. Helix is motivated considerably, if not principally, by the desire to preserve Mt. Helix Nature Theatre as a public park. After all, the reversionary clause in the deed conveying Mt. Helix Nature Theatre appears to suggest that preservation of the cross atop Mt. Helix is necessary in order to

preserve the Nature Theatre as a public park." (Emphasis added).

Second, the Memorial Cross is solid concrete, 35' high set in a deep foundation and weighing approximately 55 tons[18/]. It will cost well over ten thousand dollars to demolish the cross,[19/] It would be Petitioner's county taxes in part that would be utilized to perform this task. Petitioner strongly objects to the utilization of his tax payments for a purpose he contends is not required under either the federal or state constitutions -- particularly when that purpose would constitute a sacrilegious act, hostile to

---

18/ Declaration of Robert A. Downer (Chief of Park Services Division) filed in support of County's motion for stay pending appeal filed in the Ninth Circuit January 29, 1992 in the Helix Cross Case, Docket 92-55093; at p.2, L.4-9).

19/ Id. at p.2, L.20-22.

his own religion and that would additionally result in the threatened loss of the park foreclosing his continued use and enjoyment.

Third, Petitioners' daily religious practices and his lifestyle are strongly influenced by the existence of this memorial cross and its juxtaposition with his home. It is also Petitioners' belief that the ambience of the entire area would gradually deteriorate were this memorial cross, by which the area is recognized, required to be removed. (CR-15, P.4, L.6-14 and P.2, L.2-16). Petitioner chose this location to establish his family home, based in large part because of the existence of the memorial cross and its influence over the area. (Ibid).

Concern was voiced in oral argument in the Ninth Circuit as to where one would draw the line for such

intervention. Petitioner is a member of a definable class of persons that would be most aggrieved by removal of the memorial cross. Petitioner is a Christian and a local resident living in the immediate vicinity of the memorial park and cross, who has been a resident there for now over 26 years and makes frequent use of the same. As such he is representative of a number of people who have their homes in the immediate surrounding neighborhoods who will be most directly and adversely affected by loss of the memorial cross and the threatened loss of the neighborhood park, if the ACLU and Plaintiff succeed with their action.

The degree of injury that would result to Petitioner and others in the area from the destruction of the memorial cross and the likely loss of this neighborhood park would be both

quantitatively and qualitatively greater, to a significant degree, than to people more remote from the location of the park or to Respondent.

Certainly Petitioner can demonstrate equal or greater injury both in variety and in scope, than can Respondent in this case, or as did any of the plaintiffs' in Rabun or in numerous other cases where the plaintiffs were found to have Title III standing sufficient to seek redress in the courts under the Establishment Clause. Justice should not be denied because the courts may need to administer a case with a potentially large number of intervening defendants, even if such were involved as is not the case here -- any more than justice should be denied in class actions for money damages with multitudes of plaintiffs. This must certainly be so when

constitutional issues are the thrust of the action.

5. Local Citizens Should Not Be Denied The Opportunity To Be Heard Under The Establishment Clause When Their Religious Heritage Comes Under Wrongful Attack By The ACLU.

Contrast the concern addressed above as to where to draw the line limiting local citizen intervention in Establishment Clause cases, against the economic power of the ACLU with all of its national resources, funding and legal talent being brought to bear through its surrogate local chapter president to further its strict separationist agenda. This is but another of a long series of

Establishment Clauses cases brought by the ACLU over the past several years[20/] .

Are directly affected local citizens such as Petitioner to be denied standing to intervene to protect their own rights and assert their own views under the First Amendment, against such

---

20/ Other Christian cross cases initiated by the ACLU in their own name or in a representative capacity include: ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986); ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir., 1983); ACLU v.Miss. State. General Services Admin., 652 F.Supp. 380 (S.D. Miss. 1987); ACLU v. Eckels, 589 F. Supp. 222 (S.D. Texas, 1984); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 F.2d 338 (Ore. 1976). Other examples of Establishment Clause cases where the ACLU has asserted its strict separationist viewpoint are County of Allegheny v. ACLU, 492 U.S. 573, 109 S. Ct. 3086 (1989); Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979). Petitioner does not suggest that these examples are exhaustive.

onslought, when: (1) their local tax payments will be used to destroy the memorial cross and thereby further Plaintiff's separationist views, (2) the continuing existence of the local park will be put in jeopardy by the destruction of the memorial cross as sought by Plaintiff, and (3) they oppose the sacrilegious destruction of a memorial cross as being an unjustified act under the Constitution hostile to their religion.

Appellant further suggests that denial of intervention stifles the very adversary process by which constitutional issues are required to be resolved in the crucible of the courts. It is an uneven fight when only local government is allowed to defend against such a well orchestrated attack. Local government is hobbled by its own "political" considerations of broad based

representation. It is restricted by the very Establishment Clause at issue in asserting some of the defenses to the attack that private citizens could assert, whose rights are directly affected.

6. The Ninth Circuit Has Demonstrated A Wide Ranging Disparity And Inconsistency In Intervention Cases.

While Petitioner is proceeding in this Court by raising a constitutional question, this Court has the prerogative of ultimately disposing of this case on nonconstitutional grounds where appropriate. In that light it would appear that the Ninth Circuit has, in this case, ignored its own standards for intervention.

Justice Schroeder[21/], writing for the Ninth Circuit in Sagebrush Rebellion

---

21/ The same justice who was the lead justice before whom Petitioner's intervention case was argued. (App. C, infra. 18a).

Inc. v. Watt, 713 F.2d 525 (1983), which permitted the intervention of the National Audobun Society as a "public interest group" on behalf of defendants for the protection of birds, stated:

> "In assessing the adequacy of the Interior Secretary's representations, we consider several factors, including whether the interest of a present party is such that it will undoubtedly make all intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." (Emphasis added, at p. 528).

Petitioner believes he has already fully demonstrated that all of these criteria are clearly met -- as should have been recognized below at the time Petitioner brought his motion. This is readily apparent through an examination of Petitioner's contributions as amicus curiae in the district court, as set forth in Part C, Statement of Case, supra., (and as again demonstrated in the

appeal of the Helix Cross Case in his 49-page, 14 issue Amicus brief filed March 3, 1992 in Docket No. 92-55093)

Further, as noted at Point 3, supra, County has not, will not, and cannot urge the First Amendment "accommodation/hostility" arguments urged by Petitioner from the very outset of his efforts to intervene. As Justice Schroeder further stated in Sagebrush:

> "This court has consistently followed Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n. 10, 30 L.Ed. 2d 686 (1972) in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interest "may be" inadequate and that the burden of making the showing is minimal." (Emphasis added, at p. 528).

The Ninth Circuit, has even repeatedly declined to incorporate an independent standing requirement into the

test for intervention under FRCP 24(a). [See e.g. Portland Audubon Society v. Hodel, 866 F.2d 302, 308 n.1.].

The standards for intervention under FRCP 24(a) should not be more liberal for the protection of birds than for important First Amendment issues. The right of Petitioner to intervene should be liberally construed when (1) the potential for injury to the intervenor under the Establishment Clause is even greater than that claimed by plaintiff, (2) the intervenor has a vital stake in the court's interpretation and application of the Establishment Clause, and (3) fundamental questions that go to the very fabric of our society are raised.

7. Petitioner's Intervention Was Not Made Moot By The County Conveying The Cross, With A Small Part Of The Park Under The Cross, To The Historical Society.

On February 27, 1992 the County of San Diego advised by letter to the Ninth

Circuit that it had conveyed the cross and a small portion of the Park to the San Diego Historical Society. Petitioner anticipates that the ACLU may argue that issues of intervention are now moot. The Court should be aware that the ACLU has not urged that the case is moot in the County's Appeal in the Helix Cross Case in the Ninth Circuit (Docket No. 92-55093).

Attached as Exhibit "D" to Petitioner's amicus brief filed March 3, 1992, in Docket No. 92-55093 (the Helix Cross Case) is a copy of a newspaper article contained in the February 26, 1992 issue of the San Diego Union-Tribune. The Executive Director of the local chapter of the ACLU, Linda Hills, is directly quoted as saying "we will continue to pursue this in the courts. This is a circumvention of the Court's order and we do plan to pursue

it". Petitioner also represented to the Ninth Circuit in the same amicus brief at P.48 that he has heard Dr. Peter Irons, the National Representative, of the ACLU with the local chapter, and a Professor at the University of California at San Diego, make statements in television interviews that court action would be undertaken to challenge the transfer of any park land under both the Helix Cross and the Soledad Cross.

CONCLUSION

Petitioner urges that the destruction of this particular memorial cross to appease the ACLU and Respondent would be hostile to the religious preference of Petitioner and thousands like him in the local area under the accommodation standard that has long been recognized. He seeks to intervene to defend against a potential unnecessary

effrontery to his religion being forced through his local government.

Simply stated: Petitioner seeks to established by intervention from a concerned Christian and local resident perspective that it would be constitutionally improper to destroy this memorial cross under the accommodation view of the Establishment Clause. Petitioner asserts that Respondent urges a remedy hostile to Petitioner's religion.

This is a totally different constitutional perspective and defense than that presented by County, and one that really cannot even be argued by government with its diverse representation. To effectively assert it, Petitioner must be recognized as a party to the proceedings. For the reasons set forth in this Petition, it is respectfully requested that this Court

issue its writ so that this matter may be heard.

Respectfully submitted.

Arlington Ray Robbins
Attorney
in pro se

July 28, 1992

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 90-134 GT(IEG)

JOHN MURPHY, Plaintiff

v.

COUNTY OF SAN DIEGO, Defendants

Filed October 2, 1990
Entered October 5, 1990

Before: GORDON THOMPSON, JR., United States District Judge.

MEMORANDUM DECISION AND ORDER

FACTUAL FINDINGS

Petitioner Arlington Ray Robbins seeks to intervene pursuant to Fed.R.Civ.P.24 in the above-captioned case. The case involves a county resident's challenge to the presence of a large cross prominently displayed atop publicly-owned Mt. Helix and to the expenditure of public funds for the cross' maintenance. Named defendants in the case are the County of San Diego

and the individual members of San Diego County's Board of Supervisors.

Mr. Robbins and the members of his family are longtime residents of the Mt. Helix area, where for 24 years they have owned and improved a home which has a unobstructed view of Mt. Helix and the cross. Mr. Robbins, a Christian, states that the cross on Mt. Helix plays an inspirational role in the everyday life of his family. He notes that, while he represents only himself in this matter, he believes that his interests typify those of many members of the Mt. Helix community.

The grounds on which Mr. Robbins seeks to intervene are essentially three-fold. He contends that:

1. Removal of the cross would impair his view, diminishing the value of his property;
2. Removal of the cross would violate his First Amendment right

to freely exercise his religion and to be free of interference with the establishment of his religion because the cross' presence as a religious symbol enhances his spiritual life; and

3. The named defendants, individual members of the County's Board of Supervisors, will not adequately defend the community's interest in preventing the triggering of a reversionary clause which, Mr. Robbins alleges, may deprive the public of title to Mt. Helix in the event that the cross is removed.

This court's authority to grant Mr. Robbin's motion to intervene is based on either of two statutory procedural grounds: (1) Fed.R.Civ.P.24(a)(2), which provides for "intervention as of right" or

(2) Fed.R.Civ.P.24(b)(2), which provides for "permissive intervention."

ANALYSIS

For the reasons stated below, the petition is denied.

A. Intervention as of Right

The Ninth Circuit applies a 4-pronged test in evaluating claims for intervention as of right under Fed.R.Civ.P.24(a)(2). The test requires that:

1. Applicant's motion be timely;
2. Applicant assert an interest relating to the property or transaction which is the subject of the action;
3. Applicant be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and

4. Applicant's interest be inadequately represented by the other parties.

California v. Tahoe Regional Planning Agency (hereinafter "Tahoe Regional Planning"), 792 F.2d 779, 781 (9th Cir. 1986) (citing cases).

The prong most at issue with respect to petitioner's application to intervene is prong number two. Petitioner cites a case from the district of Pennsylvania for the proposition that an applicant for intervention need not have a specific interest in the subject property, that it is enough for the applicant's interest to relate to the subject property. United States v. Eilberg, 89 F.R.D. 473 (D.Pa. 1980). Notwithstanding the broad strokes with which the district court in Pennsylvania described its approach to evaluating applications to intervene, the Ninth Circuit has stated that an applicant

to intervene must show "a protectible interest of sufficient magnitude to warrant inclusion in the action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981) (emphasis added). Thus, the appropriate threshold issue in evaluating petitioner's application to intervene is whether the interests which he alleges are of sufficient magnitude to warrant his inclusion in this lawsuit.

1. Property Issue.

This threshold issue was addressed by the Ninth Circuit in Tahoe Regional Planning, a case presenting a situation similar to that presented by petitioner. Tahoe Regional Planning involved a suit by the State of California against a local planning agency (hereinafter "agency"). The state sought to challenge the agency's environmental protection plans. The petitioners, who were local land-owners, sought to intervene. The Ninth Circuit

stated that the agency's plans did not affect the projected use of the applicants' land and that the applicants' interests in the environment were "at most incidental, rather than direct." Tahoe Regional Planning, supra, at 781. Accordingly, the court held petitioners' interest "insufficient to compel their intervention under Rule 24(a)(2) [intervention of right]." Ibid. (affirming the district court).

Here, petitioner's stated interests in the presence of the cross on Mt. Helix are no more direct than were those of petitioners in Tahoe Regional Planning. That case, like this, involved government conduct which concerned local citizens and property-owners but did not directly affect their use of their own property. True, the county's conduct with respect to the cross in this case might affect the value of Mr. Robbin's property; however,

the agency's conduct with respect to the environment in Tahoe Regional Planning also had the potential to affect the value of property owned by applicants to intervene in that case. Cognizant of this potential impact, the district court and the Ninth Circuit in Tahoe Regional Planning held it to be merely incidental. Accordingly, this court finds that the analogous impact at issue here is incidental and does not permit intervention as of right.

Petitioner supports his argument with two zoning cases in which local residents were permitted to intervene of right on the basis that zoning changes to neighboring property might affect the value of the intervenors' property. See Wolpe v. Paretaky, 144 F.2d 505 (D.C. Cir. 1944), cert. denied, 323 U.S. 777 (1944); Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated, 429

U.S. 1068 (1975), cert. denied, 434 U.S. 985 (1977). These cases are distinguishable, however, in that while property owners and purchasers may have a right to rely on existing zoning ordinances, id. at 876, they have no parallel right to rely on the government's (or anyone else's) continuing its current disposition of public property. In other words, petitioner has no enforceable right to preservation of his view. Thus, petitioner's interest in preserving the view is of insufficient magnitude to warrant his inclusion in this lawsuit.

2. First Amendment Issue.

In addition to asserting property interests as the basis for intervention, petitioner asserts constitutional interests grounded in the First Amendment's free exercise and establishment clauses. While there may be room for argument regarding what kinds of

government conduct these clauses prohibit, there is no kind of government conduct, for example, maintenance of the cross on Mt. Helix, that these clauses require. Cf. Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890, 904-905, 489 U.S. 1 (1989) (plurality) (denial of tax benefits resulting in "substantial impact" on religious groups does not offend Free Exercise Clause where such denial does not prevent groups from observing religious tenets) (quoting Bob Jones University v. United States, 461 U.S. 574, 603-604 (1983)). Accordingly, petitioner's asserted constitutional interests in this action, not supported in law, are insufficient to warrant his inclusion in this lawsuit.

3. Reversionary Clause Issues.

Finally, petitioner makes reference to the potential triggering of a reversionary clause which, were plaintiff to prevail,

might deprive the public of Mt. Helix altogether. Be this as it may, any limitations on the title of Mt. Helix have no bearing whatsoever on the constitutional issues before the court in this case. See Evans v. Newton, 382 U.S. 296 (1966) and Evans v. Abney, 396 U.S. 435 (1970) (constitutionality of maintaining public park for use exclusively by white people an issue to be considered separately from the reversionary consequences of extending park use to non-whites). If public maintenance of the cross on Mt. Helix is found to be unconstitutional, then no reversionary consequence no matter how dire may alter or trump that finding. As a result, no reversionary consequence is of sufficient magnitude to warrant petitioner's inclusion in this lawsuit.

B. Permissive Intervention.

Having held that it is not obligated to permit petitioner to intervene of right, this court may exercise its discretion to permit intervention anyway. A grant of such permission is appropriate when petitioner's "claim ... and the main action have a question of law or fact in common" and granting such permission does not unduly delay or prejudice the adjudication of the original parties' rights. Fed.R.Civ.P. 24(b)(2). Here, the additional discovery which permissive intervention would require would generate little delay and no prejudice. Nevertheless, to permit intervention based on the grounds which petitioner has raised would inject into this lawsuit issues, such as petitioner's claim with respect to the diminution of property value, which are not relevant to the establishment clause (and related state constitutional)

claims around which the lawsuit has been pled. In this regard, it bears mentioning that this lawsuit arises in the context of two other lawsuits raising similar first amendment challenges to the presence of crosses on public property. To permit intervention in this lawsuit would distract from the principal constitutional issue raised in not one but three pending lawsuits.

CONCLUSION

Lest peripheral issues be permitted to district the court from the compelling constitutional issues which this lawsuit and its two companion lawsuits present, the court denies petitioner's application to intervene. Not unmindful, however, of petitioner's fine reputation and skills as an advocate and of the concern which he has expressed regarding this lawsuit, the court grants petitioner leave to

participate in all further proceedings as amicus curiae.

* * * * *

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 90-134 GT(IEG)

JOHN MURPHY, Plaintiff,

v.

COUNTY OF SAN DIEGO, Defendants

Filed and Entered October 16, 1990

Before: GORDON THOMPSON, JR., United States District Judge.

ORDER

This court on October 5, 1990 issued an order (a) denying the petition of Arlington Ray Robbins to intervene, pursuant to Fed.R.Civ.P.24, in the above-captioned matter and (b) granting petitioner leave to participate in further proceedings as amicus curiae. Petitioner on October 9, 1990 filed with the court a request for reconsideration, pursuant to

Fed.R.Civ.P.60(b)(6), of a portion of the court's October 5 order.

For the reasons set forth in this court's order of October 5, 1990, petitioner's request is hereby denied.

* * * * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55316

JOHN MURPHY,
Plaintiff-Appellee

and

ARLINGTON RAY ROBBINS,
Intervenor-Appellant

v.

BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors, et al.,
Defendants-Appellees

MEMORANDUM*/

Appeal from the United States District Court for the Southern District of California Gordon Thompson, Jr., District Judge, Presiding Argued and Submitted December 5, 1991 Pasadena, California

---

*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

Before: SCHROEDER and KOZINSKI, Circuit Judges, and McKIBBEN,**/ District Judge.

Appellant Arlington Ray Robbins appeals from the district court's denial of his application for both intervention as of right and permissive intervention under Rule 24, Federal Rules of Civil Procedure. The appellant sought to intervene as a private citizen in an action brought by John Murphy, a San Diego resident, to compel San Diego County to remove a thirty-six foot memorial cross from a county park located atop Mt. Helix.

To intervene as of right under Rule 24(a) an applicant must assert an interest related to the property or transaction which is the subject of the action. People of the State of California v. Tahoe

---

**/ Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

Regional Planning, 792 F.2d 799, 781 (9th Cir. 1986); Sagebrush Rebellion, Inc. v. Watt, 713 F.2nd 525, 527 (9th Cir. 1983). In this case, the appellant has no property or other financial interest in the subject property or other financial interest in the subject matter of the litigation. The existence of the cross provides him with religious and aesthetic satisfactions. His interest is neither greater than, nor differentiated from, the general interest in maintenance of the park shared by a substantial portion of the population of San Diego County. It is not the sort of interest which supports an application for intervention as of right under Rule 24(a), and we have repeatedly so held in analogous cases. See Tahoe Regional Planning, 792 F.2d at 781 (local landowners asserting incidental rather than direct effects upon their land, denied intervention in lawsuit filed by

State against regional planning agency); Westlands Water District v. United States, 700 F.2d 561 (9th Cir. 1983) (environmental group's interest in water quality insufficient to permit intervention in suit involving water delivery contracts brought by local water district against the United States).

The district court did not abuse its discretion in denying permissive intervention pursuant to Rule 24(b)(2). Appellant had no cognizable claim or defense in common with the main action as required by the Rule. The district court appropriately permitted the appellant to appear amicus curiae and considered the matters which he urged.

AFFIRMED.

* * * * *

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-55316

JOHN MURPHY,
Plaintiff-Appellee

and

ARLINGTON RAY ROBBINS,
Intervenor-Appellant

v.

BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors, et al.,
Defendant-Appellee

Submitted April 29, 1992

Before: SCHROEDER and KOZINSKI, Circuit Judges, and McKIBBEN,***/ District Judge.

ORDER

The panel as constituted above has

***/

Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* * * * *

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 91-55316 & 92-55146
DC No. CV-90-0134-GT

JOHN MURPHY,
Plaintiff-Appellee

v.

BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors, et al.,
Defendant-Appellee

and

ARLINGTON RAY ROBBINS,
Appellant

Filed March 2, 1992

Before: NORRIS, CANBY and LEAVY, Circuit Judges.

ORDER

Appellant Robbins was not a party in the district court. Accordingly, appeal no. 92-55146 is dismissed for lack of standing. Appellant Robbins' motion for a stay pending appeal, which he filed in

both appeal nos. 91-55316 and 92-55093, has been referred to the panel that previously decided appeal no. 91-55316.

* * * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55093
DC No. CV-90-0134-GT

JOHN MURPHY,
Plaintiff-Appellee

v.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and the COUNTY OF SAN DIEGO,
Defendants-Appellants

Filed April 30, 1992

Before: TANG, SCHROEDER, and BEEZER, Circuit Judges.

ORDER

Mr. Arlington Robbins' request to participate in oral argument as amicus curiae is denied.

* * * * *

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE 24
INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a

statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

* * * * *

APPENDIX H

AMENDMENT 1 TO THE UNITED STATES CONSTITUTION

Religious and political freedom. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

APPENDIX I

ARTICLE III, SECTION 2, CLAUSE 1 OF THE UNITED STATES CONSTITUTION

Subjects of jurisdiction. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between citizens of different States; -- between citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

APPENDIX J

ARTICLE I, SECTION 4 OF THE CALIFORNIA CONSTITUTION

Religion. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or he opinions on religious beliefs.

* * * * *

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 92-195

In the Supreme Court

OF THE
United States

October Term, 1992

ARLINGTON RAY ROBBINS,
Petitioner,
vs.
JOHN MURPHY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Betty Wheeler
Counsel of Record
ACLU Foundation of San
Diego & Imperial Counties
1202 Kettner Blvd., Ste. 6200
San Diego, CA 92101
(619) 232-2121

Dan Bacal
Law Offices of Dan Bacal
275 Douglas Avenue
Suite 114
El Cajon, CA 92020
(619) 588-2064

Counsel for Respondent

QUESTION PRESENTED

Whether a private citizen is entitled to intervene, pursuant to Rule 24, Federal Rules of Civil Procedure, in a case challenging government conduct in maintaining and displaying a prominent Latin cross as violative of the No Preference Clause of the California Constitution, where the asserted interest of the proposed intervenor is that the government's removal of the cross would be an act hostile to the proposed intervenor's religion.

TABLE OF CONTENTS

PAGE(S)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF ROBBINS' MOTION TO INTERVENE IN ACCORDANCE WITH CONSISTENT AND UNIFORM PRECEDENT ON INTERVENTION UNDER RULE 24. 6

II. ROBBINS' ASSERTION OF A VIOLATION OF HIS RIGHTS UNDER THE ESTABLISHMENT CLAUSE IS WITHOUT MERIT. 10

III. THE COURTS BELOW PROPERLY DENIED INTERVENTION BECAUSE ROBBINS' INTERESTS, IF ANY, ARE ADEQUATELY REPRESENTED BY DEFENDANTS. 12

IV. ROBBINS VIEWS WERE AMPLY EXPRESSED TO COURTS BELOW THROUGH HIS PARTICIPATION AS AMICUS CURIAE. 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES	PAGE(S)
Americans United for Separation for Church and State v. City of Grand Rapids, 922 F.2d 303 (6th Cir. 1991)	7
Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525 (7th Cir. 1988)	9
California v. Tahoe Planning Agency, 792 F.2d 779 (9th Cir. 1986)	8
Caterino v. Barry, 922 F.2d 37 (1st Cir. 1990)	7
Corby Recreation Inc. v. General Electric Co., 581 F.2d 175 (8th Cir. 1978)	7, 9
Donaldson v. United States, 400 U.S. 517 (1971)	9
FDIC v. Jennings, 816 F.2d 1488 (10th Cir. 1987)	8
In re Sierra Club, 945 F.2d 776 (4th Cir. 1991)	7
Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir.) cert.denied sum nom. 474 U.S. 980 (1985)	8, 9
Murphy v. Bilbray, 782 F. Supp. 1420 (S.D. Cal. 1991)	2, 5

United States v. City of Chicago,
798 F.2d 969 (7th Cir. 1986) 7

United States v. South Fla. Water Management Dist., 922 F.2d 704 (11th Cir.) 8

United States v. Texas E. Transmission Corp., 923 F.2d 410 (5th Cir. 1991) 7

Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.,
922 F.2d 92 (2nd Cir. 1990) 7

Western Palm Beach County Farm Bureau, Inc. v. United States,
___ U.S. ___ 112 S.Ct. 407
116 L.Ed.2d 356 (1991) 9

Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey) Ltd., 840 F.2d 72
(D.C. Cir. 1988) 8

STATUTES

F.R.C.P.,
Rule 24 . . . . . 1, 4, 6, 7, 9, 10, 13

CONSTITUTIONAL PROVISIONS

United States Constitution,
First Amendment 6, 10-13

California Constitution,
No Preference Clause 2

No. 92-195

In the Supreme Court

OF THE
United States

October Term, 1992

ARLINGTON RAY ROBBINS,
Petitioner,
vs.
JOHN MURPHY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent John Murphy submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

The petition for a writ of certiorari seeks review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of petitioner's motion to intervene.

The case in which petitioner seeks to intervene challenges, as a violation the constitutions of the State of California and the United States, the County of San Diego's use of county park land and expenditure of county funds[1] to display a thirty-six foot Latin cross at the summit of Mt. Helix. The district court held that the challenged conduct violates the No Preference Clause of the California Constitution; because of that holding, the court found it unnecessary to reach the federal constitutional issue, or the issues based on other provisions of the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1427 and 1438 (S.D. Cal. 1991).

---

[1]Although petitioner asserts that no public funds are used to maintain the cross, the district court noted otherwise. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1423 and n.9 (S.D. Cal. 1991).

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, and that appeal is currently pending.

Before the district court reached its decision, petitioner moved to intervene pursuant to Fed. R. Civ. P. 24, asserting a number of purported interests in the case, including his family's enjoyment of the Mt. Helix cross and incorporation of the cross into their daily family worship; the possible decline in the value of his home if the cross is removed; his assertion that the government's removal of the cross would be hostile to his religion, in violation of his First Amendment rights; and his concern that a reverter clause in the deed conveying the park land to the County may affect continued County ownership of the park in the event that the cross is removed. The district court held that none of these asserted interests constituted a legally protectable interest permitting Robbins to intervene pursuant to Rule 24. Appendix A, Petition for a Writ of Certiorari. The district court also denied Robbins permissive

intervention, noting that such intervention would inject irrelevant issues and distract from the principal constitutional issues of the case. *Id.* at 12a-13a.

Although the district court denied Robbins' intervention motion, it did permit him to participate fully in the proceedings before the district court as *amicus curiae*, and Robbins in fact did participate fully, including arguing at length at the hearing on cross-motions for summary judgment, filing an amicus brief, and obtaining judicial notice of certain facts.

Robbins appealed the denial of his motion to intervene, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, noting that Robbins had failed to "assert an interest related to the property or transaction which is the subject of the action." Appendix C, Petition for a Writ of Certiorari. Petitioner now seeks this Court's review of the Court of Appeals' decision affirming the denial of his motion to intervene.

The facts relating to the Mt. Helix cross, and the County

of San Diego's ownership and maintenance of the cross, are set forth in detail in the district court's opinion. *Murphy v. Bilbray*, 782 F. Supp. at 1422-24 and 1430-32.[2]

REASONS FOR DENYING THE PETITION

Petitioner's petition for a writ of certiorari does not satisfy the substantive standards for this Court's review, and is premised on an illogical Establishment Clause theory that has been adopted by no court.

First, the Court of Appeals' opinion affirming the district court's denial of Robbins' motion of intervene is in accord with the consistent and uniform case law on intervention under Rule 24, Federal Rules of Civil Procedure. Thus, there is no conflict between circuit courts justifying this Court's

---

[2]Although petitioner describes the park in question as a "small remote park," the district court noted that the "commanding skyline presence" of the Mt. Helix cross, illuminated every evening and discernible from a considerable distance, amplifies the 'powerful religious symbolism' of the cross." *Id.* at 1430.

review.

Second, petitioner does not properly assert any federal constitutional right. He asserts that if the County of San Diego were to remove the Mt. Helix cross from public land pursuant to a court order in the case in which he seeks to intervene, that act would be hostile to his own religion, and would violate his rights under the First Amendment of the United States Constitution. This assertion is illogical on its face, and does not confer a legally protectable interest on Robbins.

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF ROBBINS' MOTION TO INTERVENE IN ACCORDANCE WITH CONSISTENT AND UNIFORM PRECEDENT ON INTERVENTION UNDER RULE 24.

The district court's opinion denying Robbins' motion to intervene, and the Court of Appeals' decision affirming that denial, both followed consistent and uniform case law in each circuit relating to intervention pursuant to Rule 24, Federal

Rules of Civil Procedure.[3] The test for intervention reflected

---

[3]*See, e.g., Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74-77 (D.C. Cir. 1988) (listing requirements for intervention and holding that allegation of trademark infringement satisfies requirement of legally protectable interest); *Caterino v. Barry*, 922 F.2d 37, 39-42 (1st Cir. 1990) (listing requirements for intervention and denying intervention due to lack of timeliness); *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2nd Cir. 1990) (listing requirements for intervention and denying intervention due to lack of timeliness); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3rd Cir.) (stating that "presumption of adequate representation generally arises when the representative is a governmental body or officer" and denying intervention due to proposed intervenor's failure to overcome such presentation), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (listing requirements for intervention and holding that environmental group has legally protectable interest because it is a party in related administrative proceeding in which defendant is also a party); *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 413-14 (5th Cir. 1991) (denying intervention because allegations of impairment by res judicata and stare decisis are not supported); *Americans United for Separation for Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1991) (listing requirements for intervention and granting intervention to owner of religious object at issue in Establishment Clause case); *United States v. City of Chicago*, 798 F.2d 969, 972 (7th Cir. 1986) (listing requirements for intervention and denying intervention due to lack of timeliness); *Corby Recreation v. General Elec. Co.*, 581 F.2d 175, 176 (8th Cir. 1978) (listing requirements for intervention and granting alleged property owner intervention in action brought by plaintiff, who also claimed ownership, for

in Rule 24 is straightforward, and petitioner has demonstrated no conflict in the courts of appeals that would justify the granting of his petition for writ of certiorari in this case.

The courts below properly held that none of the interests asserted by Robbins constitutes a significantly protectable legal interest in the primary litigation. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir.), *cert. denied sub nom. Illinois Pro-Life*

---

damages caused by fire in building complex); *California v. Tahoe Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986) (listing requirements for intervention and denying intervention to affected landowners and to public officials in regional plan dispute because neither group satisfies interest requirement); *FDIC v. Jennings*, 816 F.2d 1488, 1491-93 (10th Cir. 1987) (analyzing interest and impairment requirements and holding that interest in negligence and breach-of-contract claims not impaired by denial of intervention); *United States v. South Fla. Water Management Dist.*, 922 F.2d 704, 707 (11th Cir.) (stating that "[t]o support intervention, a nonparty's interest must be 'direct, substantial [and] legally protectable'" and holding that farmers have legally protectable interest in water district's interpretation of water-quality standards), *cert. denied, sub nom. Western Palm Beach County Farm Bureau, Inc. v. United States*, ___ U.S. ___, 112 S.Ct. 407, 116 L.Ed.2d 356 (1991).

Coalition v. Keith, 474 U.S. 980 (1985) ("proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit."); *Corby Recreation Inc. v. General Electric Co.*, 581 F.2d 175, 177 (8th Cir. 1978) (proposed intervenor must assert "'significantly protectable interest' in the primary litigation, quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

Mere "colloquial" interest in the outcome of a case is not sufficient; to allow intervention on that basis "would turn the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously)." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532-33 (7th Cir. 1988). When Rule 24(a)(2) speaks of an "interest" it means "a legal interest, not an interest in the colloquial sense. ('I am interested in opera.')" *Id.* at 530 (citing *Donaldson v. United States*, 400 U.S. at 531). Robbins articulated only "colloquial" interests in his intervention motion; he has no legal interest in

his view of the cross from his house, in the deed's reverter clause, in the cross itself, or in any governmental decision with respect to the cross. Appendix A, Petition for a Writ of Certiorari, at 6a-11a; Appendix C at 19a-20a. Thus, his motion to intervene was properly denied.

II. ROBBINS' ASSERTION OF A VIOLATION OF HIS RIGHTS UNDER THE ESTABLISHMENT CLAUSE IS WITHOUT MERIT.

In his petition for a writ of certiorari, Robbins particularly emphasizes his claim that the remedy sought in the underlying action would be hostile to his religious preference, in violation of his rights under the Establishment Clause. This argument is illogical, and does not support a writ of certiorari in this case.

As the district court noted, with respect to the Free Exercise and the Establishment Clauses, "While there may be room for argument regarding what kinds of government conduct these causes prohibit, there is no kind of government conduct,

for example, maintenance of the cross on Mt. Helix, that these causes require.... Accordingly, petitioner's asserted constitutional interests in this action, not supported in law, are insufficient to warrant his inclusion in this lawsuit." Appendix A, Petition for a Writ of Certiorari, at 9a-10a. Obviously, if the County of San Diego's ownership and maintenance of the Mt. Helix cross violates the provisions of the California or the United States constitutions, it could not logically be argued that the constitutionally-mandated remedy itself constitutes a violation of the Constitution.

There is no authority for the proposition that a decision by the County to remove the cross, for whatever reason it might choose to do so, would violate the Establishment Clause rights of those who enjoy (but have no legal interest in) the cross. The County is under no obligation to continue to display a Latin cross on public land for the use of area Christians in their daily religious practices. Thus, Robbins possesses no cognizable legal interest in the Mt. Helix litigation arising from

the First Amendment, nor is he at risk of suffering a cognizable constitutional injury as a result of that litigation.

III. THE COURTS BELOW PROPERLY DENIED INTERVENTION BECAUSE ROBBINS' INTERESTS, IF ANY, ARE ADEQUATELY REPRESENTED BY DEFENDANTS.

When the interests of the applicant for intervention are adequately represented by existing parties, intervention is properly denied. Rule 24, Federal Rules of Civil Procedure. Robbins suggests that he can provide the perspective of a "private citizen" and Christian who is not limited by the "political and constitutional concerns" that are imposed on the governmental defendants. Petition at 15.

Since Robbins has no legally protectable interest in the case in which he seeks to intervene, adequacy of representation is not at issue. Assuming, however, that Robbins did have such an interest in the case, the representation by the defendants in that case has been vigorous, and Robbins cannot show that their representation is inadequate.

Robbins points to several ways in which his defense of the challenged County's conduct would differ from the County's approach. See Petition at 15-21. As Robbins himself notes, however, the County defendants have incorporated most of his arguments in their briefs on appeal, undermining his claim of inadequacy of representation. Other differences reflect choices in strategy and do not demonstrate inadequate representation. Indeed, the County defendants have defended the case vigorously, and there is no indication that they will not continue to do so.

Robbins implies that constitutional litigation challenging government conduct under the Establishment Clause and similar provisions of state constitutions can somehow be defended better by private citizens, who are unconstrained by "political and constitutional concerns," than by the challenged governmental bodies themselves. Neither logic nor public policy, however, support this notion that government conduct is somehow better defended by private citizens unaffected by

"political and constitutional concerns." Indeed, this view would invite private intervention in every constitutional dispute. Although there will certainly be instances in constitutional litigation when private citizens properly can assert a legally protectable interest justifying intervention, Robbins has not done so in this case, and it would be improper to permit him to intervene simply so that he can advance arguments that he believes the governmental defendants are politically or constitutionally constrained from making.

IV. ROBBINS' VIEWS WERE AMPLY EXPRESSED TO THE COURTS BELOW THROUGH HIS PARTICIPATION AS AMICUS CURIAE.

Robbins has participated fully throughout the case in which he seeks to intervene, through his status as *amicus curiae*. He filed briefs at both the district and appellate court levels. He obtained judicial notice of certain facts at the district court level, and was permitted unlimited oral argument on the cross-motions for summary judgment before the district court.

As Robbins himself notes, a number of his arguments have been adopted and advanced by the County, demonstrating the effectiveness of his participation as *amicus curiae*.[3] Thus, Robbins' participation has been extensive, and adequately served to advance his interests (albeit "colloquial") in the case.

---

[3]Indeed, the only part of the proceedings in which Robbins did not participate was at oral argument before the Ninth Circuit. Given that arguments in the three consolidated cases were heard together, with only twenty minutes of argument time to be split between counsel in the three cases, the amount of time that would have been available to Robbins had he been permitted to argue would have been negligible, and Robbins had ample opportunity to participate at the appellate level through his written arguments in his amicus brief.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Betty Wheeler
Counsel of Record
ACLU Foundation of San Diego
& Imperial Counties
1202 Kettner Blvd., Suite 6200
San Diego, CA 92101
(619) 232-2121

Dan Bacal
Law Offices of Dan Bacal
275 Douglas Avenue, Ste. 114
El Cajon, CA 92020
(619) 588-2064

Counsel for Respondents

August 27, 1992

Docket No. 92-195

IN THE SUPREME COURT

OF THE

UNITED STATES

October, 1992 Term

ARLINGTON RAY ROBBINS
Petitioner

-vs-

JOHN MURPHY
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arlington Ray Robbins
ROBBINS & KEEHN
530 B Street, Ste 1700
San Diego, CA 92101
(619) 232-1700

In Pro Se

QUESTION PRESENTED

In an action brought against local government under the Establishment Clause of the First Amendment of the United States Constitution, does a person have the constitutional right to intervene under the Establishment Clause when it is contended that the remedy being sought by Plaintiff in the action is not required under the Constitution and would in fact be hostile to religious preference of the person seeking to intervene and would cause such person both economic and non-economic injury equal or greater to that claimed by Plaintiff?

TABLE OF CONTENTS

1	SCOPE OF REPLY	2
2	RESPONDENT HAS MISLED THE COURT AS TO THE EXTENT OF PARTICIPATION BY PETITIONER IN THE HELIX CROSS CASE APPEAL	3
3	PETITIONER WOULD HAVE RESPONDED VERY DIFFERENTLY TO THE QUESTIONS RAISED BY THE NINTH CIRCUIT IN ITS REQUEST FOR SUPPLEMENTAL BRIEFS	5
4	THE QUESTION RAISED IS THE CONSTITUTIONAL RIGHT TO BE HEARD	13
5	CONCLUSION	17
6	APPENDIX K	19

TABLE OF AUTHORITIES

CASELAW:

Actmedia, Inc. v Stroh, 830 F.2d.957, 962 (9th Cir. 1986) . 6

Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, 784 F.2d 1010, 1012 (9th Cir.1986) 6

Lynch v. Donnelly, 465 U.S. 68 (1983) . 17

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (1983) . . 13

STATUTES AND REGULATIONS:

California Civil Code Section 880.340 . . 7

California Civil Code Section 885.030 . . 7

I. SCOPE OF REPLY.

Respondent's Brief In Opposition dated August 27, 1992, ("Respondent's Brief") does not challenge Petitioner's assertion that the Constitutional question raised in the Petition For Writ of Certiorari filed by Petitioner (the "Petition") has never before been considered by the courts. Petitioner believes that the arguments made in Respondent's Brief are adequately addressed for the most part in the Petition. Certain assertions, however, have been made in Respondent's Brief that require a response and further demonstrate the very different perspective of Petitioner from the County in defending against the American Civil Liberties Union ("ACLU") instigated attack on the Helix Cross. Petitioner will confine this Reply to those points.

II. RESPONDENT HAS MISLED THE COURT AS TO THE EXTENT OF PARTICIPATION BY PETITIONER IN THE HELIX CROSS CASE APPEAL

Part IV of the Respondent's Brief filed by the ACLU on behalf of Respondent is very misleading as to the extent of Petitioner participation at the appellate level in the Helix cross case.[1/] Counsel for the ACLU represents that: "Indeed, the only part of the proceedings in which Robbins did not participate was oral argument before the Ninth Circuit." (Respondent's Brief, N 3, Part IV, P 15).

Counsel with the ACLU "overlooks" the comprehensive supplemental briefs that were requested <u>after</u> oral argument

---

1/ <u>Murphy v. Bilbray, et al.</u>, D.C. No. 90-134 GT(IEG); Docket No. 92-55093 In the United States Court of Appeals for the Ninth Circuit (hereafter "Ninth Circuit").

by the Ninth Circuit with regard to five substantial issues (see Appendix "K", pp 1a-2a included with this Reply Brief, proceeding seriatum from the appendices A-J in the Petition). Both the County and ACLU filed comprehensive supplemental briefs. The ACLU filed a 15 page, VII part brief dated July 21, 1992, with 33 exhibits attached. The County filed a 14 page, VI part brief dated July 7, 1992. Petitioner was not made aware of this request for supplemental briefs until after they had been filed with the court by the parties. The last sentence of the Ninth Circuit's order makes clear that only briefs of parties were being requested and that briefs from amicus curiae would not be received.

Furthermore, Rule 29 of the Federal Rules of Appellate Procedure provides for only the filing of one brief by Amicus Curiae, and no provision is made for the

filing of even a reply brief. The ACLU's view as stated in N.3, Part IV, P. 15 of Respondent's Brief that there was "ample opportunity [for Petitioner] to participate at the appellate level..." is simply untenable.

III. PETITIONER WOULD HAVE RESPONDED VERY DIFFERENTLY TO THE QUESTIONS RAISED BY THE NINTH CIRCUIT IN ITS REQUEST FOR SUPPLEMENTAL BRIEFS.

The Ninth Circuit panel requested supplemental briefing on five significant points as follows:

> (1) Whether the interests of the grantor's heirs have been adequately considered by the district court.
>
> (2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether, under the facts of this case, conveyance to private parties of all or part of dedicated park land held in trust violates California trust, statutory or constitutional law.

(4) Whether, under the facts of this case, appointment of a successor, non-governmental trustee would be a feasible remedy.

(5) Whether disputed facts remain requiring a trial.

The standard for review on appeal of the district court's decision on constitutionality is de novo. (Actmedia, Inc. v Stroh, 830 F.2d.957, 962(9th Cir. 1986); Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, 784 F.2d 1010, 1012(9th Cir.1986). While Petitioner was permitted full participation by the district court below as amicus curiae --

at the critical de novo appeal level he was summarily relegated at the outset to the limited role of a typical amicus curiae as if making an appearance in the case for the first time.

As a party with full appellate participation rights, Petitioner would have again responded from a very different perspective than the County of San Diego or the ACLU in their supplemental briefs. As an additional example arising out of the supplemental brief of the County, it was asserted at Page 8 that the heirs of the donor "cannot enforce any reversionary claims under the deed because they have failed to record the legally required notice of their reversionary claims as required by California Civil Code Sections 880.340 and 885.030." The County must take this position as a rear guard action to defend against a potential reversion of the

entire park if the memorial cross dedicated to the memory of Mary Carpenter Yawkey is ordered removed. The County is well aware, however, of the constitutional infirmities that the County would face in attempting to apply those code sections in defense against a reversionary claim made by the Yawkey heirs under this 63 year old conditional gift made in trust -- which Petitioner would have pointed out to the Ninth Circuit, had he been permitted to participate.

With regard to points (1), (3) and (4) of the Ninth Circuit's request, had petitioner been permitted to file a supplemental brief in response to the Ninth Circuit's request he would have argued that the County accepted the gift of the existing memorial park in trust,

as the deed so states.[2/] If it were determined that the County could not constitutionally honor the conditions of the deed, then, in the alternative, the County was duty bound to transfer the memorial park and cross, along with the perspective endowment, to a private group that could maintain the personal memorial -- and the court in such event should so order.

Petitioner had actually suggested earlier at the district court level in his opening brief that:

> "If the court...concludes under the prohibitions of the Establishment Clause that the County cannot

---

2/ The memorial park was constructed in 1925 with private funds equivalent to approximately $1,200,000.00 in todays dollars along with the existing centerpiece memorial cross erected in memory of Mary Carpenter Yawkey.

maintain the memorial under the terms it was deeded to the County in trust, then amicus curiae will volunteer to create a private trust organization and solicit the necessary additional endowment funding to maintain the park for its original intended purposes, if this court orders the County to surrender the trust corpus as being inconsistent with its governmental functions under the Establishment Clause." [CR-39, at P.17]

The ACLU obviously has no interest in seeing the memorial cross perpetuated by placing the park under a private trust to avoid destruction of the cross -- as it argued to the contrary in its Supplemental Brief. The County Board of Supervisors also has no such interest and did not argue in favor of such a possible solution in their Supplemental

Brief. Their primary responsibility is perceived to be to retain the park in the County's park system for the benefit of their diverse electorate -- even if the memorial cross must be sacrificed toward this end. Such action would be totally contrary to the very spirit and purpose of the original gift made by the Yawkey family in trust to honor their mother, Mary Carpenter Yawkey, including this special memorial monument.

Of the participants in the district court proceedings, only Petitioner was fully motivated to address points (1), (3) and (4) of the Ninth Circuit's request (App. K, P.2) from the perspective of preserving both the park and memorial cross. Petitioner perceives this to be the better alternative to the ordered sacrilegious destruction of this long standing memorial cross should the courts uphold the district court's ruling

that it cannot continue on public land. As quoted above, Petitioner had already suggested that very approach in the district court as an alternative, were the court to conclude that the memorial cross could not continue on public land.

Despite the Ninth Circuit's expressed interest in exploring this very concept, this positive viewpoint regarding the alternative of a private trust has been barred at the appellate level, as Petitioner has no standing to be heard on appeal as a result of the denial of his intervention. This demonstrates yet another practical example of why intervention should have been allowed. It also provides additional focus on the inconsistency of the Ninth Circuit in its intervention rulings, as discussed at Pages 57-60 of the Petition addressing the Ninth Circuit's opinion holding for liberal

intervention in Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525(1983).[3/]

IV. THE QUESTION RAISED IS THE CONSTITUTIONAL RIGHT TO BE HEARD

At Page 11 of Respondents Brief, counsel for the ACLU essentially argues that if ownership and maintenance of the memorial cross violates the constitutional prohibitions, then "it could not be logically argued that the constitutionally-mandated remedy itself

---

3/ The judge that wrote the Sagebrush opinion was the lead Judge of the Ninth Circuit panel before whom Petitioner's intervention case was argued (App.C, P.189 of the Petition). The same judge is also on the Ninth Circuit panel reviewing the Helix Cross Case on appeal (Docket No. 92-55093 -- see App.K).

constitutes a violation of the Constitution." This conclusionary argument begs the question. The question to be decided is whether or not the Yawkey memorial cross violates the constitutional prohibitions. Petitioner seeks only to be fairly heard before the appellate courts that will ultimately decide the question de novo. He seeks only to be permitted to participate as he believes is his constitutional right as set forth in his Petition.

If Petitioner's "accommodation" argument were to prevail on appeal, then there simply is no "constitutionally - mandated remedy", (quoting from Respondent's Brief). If the ACLU strict separation viewpoint prevails, then at least constitutional due process will have been served, and the decision will have emanated from full advocacy by all

affected parties coming from very different perspectives.

This type of conclusionary argument by the ACLU stems from an obvious assumption that the strict separationist doctrine is the law of the land at both the California and National level. The ACLU essentially proceeds from a bias that a Christian cross on public land is wrong per se. Petitioner has asked in response - Does this apply to large individual memorial monument crosses long standing in publicly maintained cemetaries? (See pages 16-17, and 38 of the Petition). If not, what distinction is drawn as to a memorial monument cross erected originally as part of a private memorial park dedicated to a single person 67 years ago created with private funds, and four years later donated to the County in trust? Based on the reasons set forth in his Petition,

Petitioner believes, that he has constitutional standing to intervene to make such arguments that the County simply has not made and will not make!

This conclusionary argument by Respondent is particularly focused on here because it falls in the same category as contended by the ACLU below that Petitioner has no constitutional right to require the cross to be maintained on public property, which was picked up in the district court's decision rejecting intervention on constitutional grounds.[4/] As addressed in the Petition, the issue here is the constitutional right <u>to be heard</u> on whether or not the state or federal constitutions mandate removal of this particular memorial cross under the

---

4/ See Petition, P.39.

unique circumstances of how it came to be and continues to exist. Petitioner seeks to be heard on the "accommodation" and "anti-hostility" requirements of the Establishment Clause as extolled in Lynch v. Donnelly, 465 U.S. 68 (1983) [See Petition at PP 34-40]. He seeks to counterbalance the strict separation bias of the ACLU -- which the County has not done and cannot do, for fear that by even making the argument the County might be accused of supporting a specific religion in violation of the state and federal constitutions.

CONCLUSION

The motivation and constitutional perspective of Petitioner, as a Christian and long time resident user of the memorial park, has already been

unqualifiably demonstrated as materially different than the parties. The County cannot, will not, and has not adequately represented that perspective -- not only as to the "accommodation/hostility" constitutional issue but in several other particulars, as set out in the Petition and this Reply. Petitioner urges the Court to issue its writ so that this matter of the Constitutional right to intervene in the Helix case may be heard.

ARLINGTON RAY ROBBINS
Attorney, in pro se

September 11, 1992

File Date:
June 23, 1992

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55086

JAMES ELLIS,
Plaintiff-Appellee,

-and-

THE CITY OF LA MESA, et al.,
Defendants-Appellants,

No. 92-55087

PHILIP PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellees,

-and-

THE CITY OF SAN DIEGO,
Defendant-Appellant,

No. 92-55093

JOHN MURPHY,
Plaintiff-Appellee,

-and-

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants-Appellants,

-and-

ARLINGTON RAY ROBBINS, Intervenor-Appellant.

Before: TANG, SCHROEDER and BEEZER, Circuit Judges

ORDER

Submission of these consolidated cases is withdrawn. Four parties are to file supplemental briefs.

The City of San Diego, as appellant in cause No. 92-55087, is requested to address the following issues:

(1) Whether the interests of the Soledad Memorial Association have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether the interests in real estate supporting the cross can be severed, and if so, will the conveyance of such land by a municipal corporation to private parties violate California statutory or constitutional law.

(4) Whether disputed facts remain requiring a trial.

The County of San Diego, as appellant in cause No. 92-55093, is requested to address the following issues:

(1) Whether the interests of the grantor's heirs have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether, under the facts of this case, conveyance to private parties of all or part of dedicated park land held in trust violates California trust, statutory or constitutional law.

(4) Whether, under the facts of this case, appointment of a successor, non-governmental trustee would be a feasible remedy.

(5) Whether disputed facts remain requiring a trial.

The briefs of the City of San Diego and the County of San Diego shall not exceed 15 pages each. These briefs shall be served and filed on or before 14 days from the date that this order is filed. The plaintiffs-appellees in the two causes each are requested to file an answering brief, which shall not exceed 15 pages. These briefs shall be served and filed on or before 28 days from the

date that this order is filed. Further briefs from other parties or from amicus curiae are not requested and the clerk of this court shall not file such briefs.